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SOME DANGEROUS QUESTIONS.

THE Government of the United States is beset with many unsettled questions of the gravest importance, relating to the laws of its organization. The Constitution is not free from such questions, and the Statutes abound with them. The present seems to be a favorable time for considering the defects in our system, some of which have repeatedly involved the country in great perils.

The people of the United States have been cautioned and admonished, in every way that experience can give instruction, that, if they would preserve the form and essence of their republican Federal Government, they must now begin the work of repairing its defects and providing for its future safety.

Since 1860,—not to go back to earlier times,—the history of the United States has been so crowded with events, any of which would have endangered the strongest and most firmly established government of the world, that the mind stands balanced in conjecture as to whether we have escaped destruction by superhuman aid or through the saving power of the love that the people have for their Government, with which they have borne it up above every threatened danger.

But, to whatever power we are indebted for our safety in the tempests of civil war and political strife through which we have

passed, and for the precious opportunity of considering the present and the future in the security of peace with all men and nations, and in the midst of unparalleled prosperity, it is manifest that our duty of faithful and patriotic care for the future welfare of our country was never so important as it is now.

The great body of the American people, irrespective of localities or pursuits, are steadfastly anchored in the belief that in their State and Federal governments they have the best heritage of liberty and justice that was ever secured to any people. It is this fact that kindles their love for their institutions, and excites them to jealousy when the just powers and authority of either their State or national governments are put in jeopardy.

This enlightened conviction and ardent affection of the people supply to these governments their vital force, and secure them against any assault which the people are in condition to meet and resist.

It has been established in our recent history that the power of the people is adequate to protect the Government from any degree of violence, and that it is safe to trust to their power to meet any form of open aggression upon the States or the Federal Government. This fact has been so well established that there is but little ground for apprehension that any such open attack will be made upon any of our governments. The danger is from another quarter, and will arise in a different form.

The unholy ambition of men who have courted the people for their confidence, and their lust of power, which changes the servants of the people into their masters, and destroys all sense of official responsibility, will not fail to point out to those who would make their hold on the great offices perpetual, the flaws and defects in our organic system which must be bridged over, from time to time, with some expedient of usurpation, in order that the Government may continue to exist. It will be claimed by them that such usurpations are necessary to execute the will of the people, which will be accordingly extolled as being above the Constitution. And in cases where there is serious distrust of the success of such measures, they will be approved and confirmed by a sort of *plébiscite*, in which a subsidized press will assume to utter the voice of the people.

In such manner the people will be accustomed to have Executive and Congressional usurpations conducted in their names, and, while they are flattered with the assurance that such measures

are for their security and advantage, they will too often fail to perceive that their liberties are endangered.

By our omission to provide against all necessity or excuses for irregular action in the conduct of the Government, we furnish a plea for usurpation which may, in the end, convert the Government into a mere instrumentality of mob rule.

Measures which can find no sanction except in "the law of necessity," and acts of public administration that are not warranted by any law, and must receive their validity from the subsequent ratification of Congress, however beneficial they may be, are to the last degree dangerous to the people and their government. Usurpation is stealthy, secret, and intriguing. It never is actuated by a good motive, and has no other aim than selfish aggrandizement. Its vigilance is always greater than that of the virtuous spirit of justice and liberty. Its tenacious hold on power resists the most determined efforts to drive it away from its purpose, and it can seldom be met successfully except by means of prevention provided in advance. The will of the people—the vital power of government—is ineffectual to meet a secret usurpation set on foot by the trusted agents of government, unless it can be concentrated upon some act of open and clear invasion of their rights secured by indisputable law. If the usurper can fairly engage in debate with the people as to his right to exercise the power he claims, and can protest, with apparent candor, that he usurps power in their name, and only for their advantage or safety, he thereby too often gains all the ground that he may need in order to supplant, with his mere will, every law that may obstruct his designs. It is in this view that it becomes so important to the people that they should, in advance of the actual appearance of danger, guard their rights, powers, and liberties against abuse by those into whose hands they must of necessity be intrusted.

The people are now enjoying the happiness of unusual prosperity, and the repose of an apparently peaceful security.

It is because our Government is so much under the direct control of the popular will, and seems so safe under that shelter, that its greatest dangers are found to spring up in our seasons of greatest prosperity. When the vigilance of the people is asleep in the embrace of luxurious contentment, the enemy is abroad, and the danger is supreme.

It is no longer the duty of the outlook for dangers to our

Government to search the distant horizon for the signs of storms that may gather to vex us; but to examine the smooth seas for sunken rocks that may destroy us without warning. There is no danger that war between the States will ever be repeated. The States will never again be reconstructed by act of Congress. No State will ever be banished from the Union, or denied its equal suffrage in the Senate. As long as there is constitutional government in America, each State will be complete in its autonomy. No standing army, or fleet, will probably ever menace a State with coercion. The people will be on the alert to give a check to such rugged policies, and to remedy such troubles as may arise, by a resort to measures less objectionable than cruel warfare. Internecine war will cease to be an American remedy for internal strife, or the arbiter of controversies between the States. We will find in the Supreme Court, or in conventions called by the States in conformity with the Constitution, some authoritative and peaceful solution of difficult questions that may hereafter arise. The wisdom that will compel us to such a course is at least one good and lasting result of the sad experiences of our great civil war. Many centuries will pass away before the American people will forget how dangerous and costly is the effort to settle disputes relating to constitutional rights, where they involve the honor, the privileges, and property of great communities, and the pride of race or of sections, by the arbitrament of the sword. They will remember with what desperate obstinacy even a small minority of our people will defend and protect what they believe to be their just rights, and the immense expenditure of blood and treasure it requires to overcome them. So that smoother counsels and more peaceful methods of adjustment may be safely relied upon, in the future, with reference to any controversies that may arise between the people of the several States.

We have, therefore, an unembarrassed opportunity to turn our attention to other dangerous questions that lurk in the body of our laws of governmental organization. In such matters all the people and all sections of the country have a common and equal interest. We are all entitled to a safe government.

A brief narrative of the more important dangers through which we have passed within the last sixteen years will serve to show the nature of some of the questions which are still left open, and for the settlement of which we cannot too earnestly labor.

The conclusion of the war left a perfect constitutional union between all the States, in which each State was the equal of another, according to one theory; but, according to another theory, the States that had been in rebellion were not entitled to participate in the conduct of the Federal Government, further than to ratify amendments of the Federal Constitution. This diversity of opinion has been practically settled by accomplished facts and the acquiescence of the people, and is not now regarded as an open question. The States are equal.

The assassination of Mr. Lincoln, through which the powers and duties of the office of President devolved upon Andrew Johnson, Vice-president, and his subsequent impeachment, in which he was put upon trial as the President of the United States, and was acquitted, settled the question that the Vice-president succeeded to the office of President by the operation of the Constitution, and that, therefore, the office of Vice-president became vacant when Mr. Johnson became President. A majority of thirty-five to nineteen of the Senate voted that Andrew Johnson, President, was guilty on three of the articles of impeachment presented against him by the House of Representatives, and a majority of thirty-four to sixteen, after a full trial, refused to give judgment upon eight other articles so presented; and so, being acquitted on three of the charges, he went through his term of office and into his grave under a censure of the House, from which the Senate refused to relieve him, because it had not the power to declare him guilty, and chose to leave him under accusation. The power of the Senate thus to refuse to a President a judgment of acquittal, after a full hearing, on the trial of an impeachment (if it is an open question), may not be dangerous, except to the character of the country. But Hon. B. F. Wade, of Ohio, was then the President, *pro tempore*, of the Senate, and voted for the impeachment of Andrew Johnson. The law of Congress, approved on the 1st of March, 1792, is as follows:

"That, in case of the removal, death, resignation, or inability, both of the President and Vice-president of the United States, the President of the Senate *pro tempore*, and in case there shall be no President of the Senate, then the Speaker of the House of Representatives, for the time being, shall act as President of the United States until the disability be removed, or a President shall be elected."

If this statute, which is all the law on the subject, is constitutional (and this is an open and dangerous question), Mr. Wade

voted to make himself President of the United States. Whether he had the right to do this, is as serious a question in ethics as it is under parliamentary and constitutional law. Whether the President *pro tempore* of the Senate can be declared by a law of Congress as the officer who may in any case act as President of the United States, is an open question, and fraught with many serious dangers.

The fifth clause of Sec. 1., Art. II., of the Constitution is as follows: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice-president, and the Congress may, by law, provide for the case of removal, death, resignation, or inability both of the President and Vice-president, declaring what officer shall act as President, and such officer shall act accordingly until the disability be removed, or a President shall be elected." It is not intended now to discuss the questions to which reference is made, but their magnitude and difficulty will more distinctly appear by a statement of some of the grounds of debate with which their solution seems to be embarrassed.

The act of 1792, above quoted, seems to be rested on the sole ground that the President *pro tempore* of the Senate, and the Speaker of the House, are made "officers" of the respective houses by the provisions of the Constitution. This fact does not establish, however, the other disputed proposition that they are *the* officers who may be declared by law of Congress as entitled to act as President of the United States.

The prescribed tenure of office in such cases is during the "inability" of the Vice-president, or until a President is elected. During that period, the officer designated by the law acts as President of the United States in virtue of the Constitution and the law, and it is beyond the power of the Senate to remove him as Senator, or as President, by expulsion, and, possibly, even by impeachment. In every practical sense he ceases to be a Senator, but in fact must remain in that office so as to be or to remain President *pro tempore* of the Senate, in which capacity he is to act as President of the United States by his assignment, as Senator, to the temporary discharge of the duties of that office. This unavoidable involvement of the powers, functions, and duties of one who is filling three offices at the same time, in which many of his duties are wholly repugnant, has never been provided for by law.

There is serious doubt if this could be done. No State can, without its consent, be deprived of its equal suffrage in the Senate (Constitution, Art. V.). If Mr. Wade had succeeded to the powers and duties of the office of President, through the impeachment of Mr. Johnson, he must either have remained in the Senate to represent his State, or else Ohio, without its consent, must have been deprived of its equal suffrage in that body. It is obvious that he could not have remained in the Senate to participate in enacting laws which he was compelled to approve or disapprove as President. And so of appointments to office.

The boundaries of jurisdiction fixed by the Constitution between the legislative and executive departments seem strongly to forbid that any man can discharge the constitutional duties of one department while holding a constitutional office in the other, and this objection, with some of those above adverted to, applies to the Speaker of the House. It is not necessary to go further in the examination of the difficulties that the country would have met if Mr. Wade had succeeded to the Presidency. This open question would have led to the most dangerous discussion, and must have produced violent agitation. While in office, and with no one to succeed him (if the objection to his holding was valid on constitutional grounds), his right to act as President would have been fiercely assailed. He would have been regarded by millions of people as a usurper who had by his own vote, as Senator, removed Andrew Johnson so that he might unlawfully occupy his office. If he was not entitled to act as President under the Constitution, that great office would, through a defect in the law, have been vacant, and could not have been filled otherwise than by usurpation.

Here then is a chasm of appalling darkness in our Constitution, or in our laws of organization as a government, in which there is no light to guide us, no precedent to direct us, and no hand to lead us if we wait until the evil hour is upon us to provide for the security of the Presidential succession.

Another open and dangerous question exists in the fifth clause of Section 1, Article II., of the Constitution, which is as follows: "In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of said office, the same shall devolve on the Vice-president." Here the office devolves upon the Vice-president by the simple force of the mandate of the Constitution, "in case of the inability of the President to discharge the powers and duties of said office."

Does this feature of the Constitution execute itself when "the case" exists, or is that a matter to be determined and regulated by law? In either case we are equally forlorn, since neither the Constitution nor the law makes any provision on the subject, by which the inability of the President is to be ascertained and declared.

A Vice-president who is a bold and determined man, and backed by a popular movement which a weaker man in the Presidential office might be unable to withstand, would find it easy in his own mind to assume "the inability of the President to discharge the powers and duties of the said office," and to claim that the case existed in which the Constitution devolved the office of President upon him. This would apparently be a bold usurpation. But who is designated by the law or the Constitution, in the recess of Congress, to question the right of the Vice-president at least to assume the Presidential office? Neither the laws nor Constitution define what is the nature, or degree, or length of continuance, of the inability that disqualifies a President from discharging (performing, or exercising) the powers and duties of the office.

Since the second of July last, we have been mournful witnesses of the utter inability of the President to discharge the powers and duties of his office, through painful sufferings inflicted upon him through the murderous hand of an assassin, or else by the mad freak of a maniac. Death or insanity could scarce have inflicted upon the President a more complete disability as to the practical discharge of his powers and duties. We have no system of regency, or of a responsible cabinet or council of state through which we can conduct the Government, during a temporary inability of our chief magistrate. During all the weary months of his weakness and suffering he cannot delegate any of his personal duties as President, or any of his constitutional powers of the higher sort, to any other person. His powers are virtually in abeyance, and the executive arm of the Government is paralyzed. This state of things could not have been expected to exist, even for a short time, by the framers of our Constitution.

Our dangers under these circumstances, while they are fortunately not disastrous in this time of peace, are very grave. If foreign war should suddenly occur, the President could not issue an order to army or navy to put them in position for our defense.

If treason or insurrection should occur in the States, his powers of repression would be nugatory. If the treasury should be robbed by its custodians, he could not remove the robbers from office, or change the keys to other hands. If treason should appear in his cabinet, he would be powerless to detect or resist it, or to remove the guilty ministers. If the custom-houses, post-offices, mints, or land-offices become vacant, he cannot fill them up with other persons. If Congress were in session, the embarrassment would only be increased and the difficulties multiplied, for he could neither send in a message nor consider any measure they might enact. The pardoning power cannot reach the innocent man, whose life may have been forfeited through perjury or by a misguided effort to do justice. Indeed, the very life of the Government, so far as it is in the keeping of the President, is stricken down by the assassin's weapon, "and languishing does live" in the feeble pulsations of the chosen of the people. Our sorrow for the sufferings of the President almost forbids us to examine into the condition in which the country is left by this horrible blow, or to suggest anything as a remedy which admits the real danger of the situation.

God may in his mercy lift us above our misfortunes, and in good time; but when we reflect upon what we have done to provide against such calamities, we feel that our prayer, as a people, should be for pity upon our neglect of duty. We have taken no proper care to provide against misfortune. What may befall us before the President can possibly resume the duties of his office, no man can tell. We only know that a practical inability exists on his part to discharge these powers and duties; and that we have no tribunal to consider the extent of his inability, or to meet its consequences, or to provide for any exigency in which the country may be placed by reason of this event. If the President and Vice-president were both removed or disabled from discharging the powers and duties of the Presidential office, we have not even the precarious chance of a succession by the President of the Senate, or Speaker of the House. We are without such officers. Where the fault of this dereliction of duty may justly rest, is not an inquiry pertinent to this article; but it is a matter that requires to be investigated.

The Senate, in the choice of a President *pro tempore*, would, if assembled now to meet a great emergency, find itself equally divided between the great political parties. A fact that makes

the outlook for the country less cheerful at this moment, but greatly strengthens the argument for prompt action in making provision for the future safety of the country.

During this entire century the people and the Congress have been anxiously considering how they could best provide for "a free ballot and a fair count" of the votes of the Electors for President and Vice-president. Not one hair's breadth of actual progress has been made toward a solution of the real difficulties to be met. The subject has been discussed until it would overtax the most subtle mind to conceive of any phase of any question connected with the matter that has not been considered. Any adjustment of the difficulties which grow out of our imperfect constitutional provisions on this subject, if generally accepted as being fair, would be better than to leave it without any sort of regulation.

The real obstruction to the adoption of some permanent rule or law on this subject has been found in the morbid apprehensions of political parties that some advantage would accrue to their opponents from the measures that have, so far, been suggested.

In 1876 it was found to be necessary, in order to secure the peace of the country, to adopt the most extraordinary measures for counting the votes of Electors. The result was declared, and was sustained by the will of a virtuous and patriotic people, who did not receive it as a just judgment, but as a declaration of an American tribunal made in pursuance of law, and therefore conclusive. Still it has left a tarnish on the history of that period, and a feeling of resentment in the hearts of the people which will never be removed, however just or unjust the reproach may be.

When the Houses came to count the votes in Mr. Garfield's election, after fruitless efforts to provide a rule, or a law, under which they could be actually counted, it was necessary to resort to a temporary expedient by which all questions were suppressed that could give rise to controversy, in order to declare a result which no one disputed, but which left the vote of Georgia uncounted. If New York had voted for General Hancock, Georgia voting, as she did, on a day not fixed by the laws of the United States, the result would probably have been a tie in the Electoral College. One vote in the House might also have divided the States equally, and the Senate in that event would have chosen a Vice-president who would have become President, or else a person not elected by the people would have captured the office. It would have

been beyond the bounds of a reasonable hope to have expected a peaceful result in this gauntlet of chances to which this great office would have been thus exposed. It should be enough to say to a wise people that all questions are open and dangerous that relate to the counting of the votes of Electors. They are as numerous as it is possible for the ambition, the cupidity, the fraud, and the skill of wicked men to invent.

Other questions of momentous consequence are also open and dangerous, but as they do not relate particularly to the organic system and functions of the Government, they are passed by. What the remedy should be for the evils which so abound in our Government, is left to the reflections of thoughtful men.

It may be impossible to provide by law for the performance by others of the duties and powers of the President during a temporary inability, or for determining when, and how, and under what circumstances his permanent disability vacates his office. But the Government cannot stop because a President is unable to execute the powers and duties of his office, by reason of mental or physical disorder. If the difficulty can only be met by amending the Constitution, no time should be lost in providing that remedy.

In the darkness that has fallen upon the country and clothed it in sorrow for our stricken chief magistrate, we must realize that other and deeper shadows may come to cloud the future if we are not vigilant to prevent them. The time is auspicious for united and harmonious effort in the work of providing for the country every security that wise and just laws can furnish against every evil in our organic system that can be foreseen. If we are not agreed in all things, it is now apparent that in some great convictions and ennobling sentiments the American people are of one mind and one spirit. If the pride of party success and domination, and the acrimony of sectional strifes, have been almost forgotten during more than a month of national anxiety, in which every heart has throbbed with one pulsation, there can be no excuse for us if we do not improve this occasion and deal with these open and dangerous questions without permitting our counsels to be again disturbed by such considerations.

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